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IN THE

Supreme Court of the United States

October Term, 1981

LEONARD H. TOSE, TOSE INC., and the PHILADELPHIA EAGLES FOOTBALL CLUB,

Petitioners,

v.

FIRST PENNSYLVANIA BANK, N.A., BUNTING, JOHN R.; PEMBERTON, JOHN C.; FORSTATER, SIDNEY; PROVIDENT NATIONAL BANK; CHASE MANHATTAN BANK, N.C.; GIRARD BANK; and PHILADELPHIA NATIONAL BANK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS GIRARD BANK, PHILADELPHIA NATIONAL BANK AND PROVIDENT NATIONAL BANK IN OPPOSITION

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Rules

Federal Rules of Civil Procedure:
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OPINIONS BELOW

The reported opinions below are provided in the Appendix to the Petition for Writ of Certiorari ("P. App."). The portion of the trial transcript dealing with the district court's grant of directed verdicts on Count I of petitioners' Complaint is attached hereto as Respondents' Appendix ("R. App.").

JURISDICTION

As set forth in the Petition for Writ of Certiorari, jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Insofar as respondents herein (Girard Bank ["Girard"], Philadelphia National Bank ["PNB"] and Provident National Bank ["Provident"]) * are concerned, the statutes involved in the Petition for Writ of Certiorari are:

§ 1 of the Sherman Act, 15 U.S.C. § 1; [1]

§ 4 of the Clayton Act, 15 U.S.C. § 15.[2]

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* Girard is a wholly-owned subsidiary of the Girard Company, a publicly-owned corporation; PNB is a wholly-owned subsidiary of Philadelphia National Corporation, a publicly-owned corporation; Provident is a wholly-owned subsidiary of Provident National Corporation, a publicly-owned corporation. Respondents incorporate herein the more detailed statements of their corporate relationships which have been filed with the Clerk of the Court.

1. 15 U.S.C. § 1 provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

2. 15 U.S.C. § 15 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, in light of petitioners' failure to produce evidence at trial from which a jury could have inferred that respondents engaged in concerted action, the Court of Appeals properly affirmed the district court's grant of directed verdicts in favor of respondents PNB and Provident on petitioners' claim that respondents conspired to deny them credit?

2. Whether, in the absence of any evidence of communications with any alleged co-conspirator on the subject matter of the alleged conspiracy, the Court of Appeals properly affirmed the district court's grant of summary judgment in favor of respondent Girard on petitioners' claim that respondents conspired to deny them credit?

3. Whether, in light of petitioners' failure to offer evidence of facts crucial to their theory of liability, the Court of Appeals properly affirmed the district court's grant of summary judgments in favor of respondents herein on petitioners' claim that respondents conspired to fix interest rates?

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioners Leonard H. Tose, Tose, Inc. and the Philadelphia Eagles Football Club filed suit against respondents herein and others on May 5, 1978. Petitioners asserted a variety of state and federal claims; for the purposes of the Petition as it pertains to these respondents, the relevant portions of the Complaint are Counts I and IV.[3] Count I alleges that these respondents violated § 1 of the Sherman Act, 15 U.S.C. § 1, by an alleged concerted refusal to lend money to petitioners Tose and the Eagles. Count IV alleges a violation of § 1 of the Sherman Act, 15 U.S.C. § 1, by virtue of an alleged conspiracy to "tamper" with interest rates.

As it relates to these respondents, Count I of the Complaint is based primarily on Tose's difficulties in obtaining financing for himself and the Eagles between July 29, 1977 and March 1, 1978. Prior to that time, Tose and the Eagles had been financed by respondent First Pennsylvania Bank; after that time, they received permanent financing from other sources. Petitioners allege that they were denied financing by the banking respondents during this seven-month period pursuant to a conspiracy to deny them access to the credit market.

In the Court below, petitioners relied on naked speculation to establish the participation by the respondent banks in a "banking boycott." Petitioners produced evidence on summary judgment and at trial which established

3. The Petition also refers, in the statement of "questions presented", to the directed verdicts and summary judgments in respondents' favor on Count III of the Complaint, asserting pendent tort claims under state law. This aspect of the case is not addressed in petitioners' statement of reasons for granting the writ, nor otherwise considered in the Petition, and therefore is not responded to herein.

that each respondent herein had been contacted on one or more occasions regarding participation in a loan to Tose and the Eagles, and that each had declined to participate. The same documentary evidence and testimony (both by deposition and at trial) established that each banking respondent acted as it did toward petitioners for its own business reasons, and without any consultation with any other alleged conspirator.[4] This evidence is described in the Opinion of the Court of Appeals, P. App. at 16-23.

On the basis of this evidence, petitioners argued that the respondents conspired to deny Tose and the Eagles access to the credit market. Petitioners relied on the "parallel" decisions of the banks not to extend the requested credit,[5] and the fact that representatives of the bank respondents occasionally met under the auspices of the Philadelphia Clearing House Association. This latter fact, petitioners urge, establishes that respondents herein had an opportunity to conspire, although there is no evidence of discussions regarding Tose or the Eagles.

Count IV of petitioners' Complaint alleged that respondents herein and others fixed interest rates in the four-county Philadelphia area.[6] This claim was based on the

4. A meeting did take place between respondent Provident and Herbert Barness, originally a defendant in the action. Barness was at that time a limited partner in the Eagles, and met with officials of Provident to discuss the outstanding loan request by Tose and the Eagles. The Court of Appeals specifically addressed this fact in its evaluation of the evidence, and found it, together with the other evidence, insufficient support for a finding that Provident had participated in a conspiracy. P. App. at 34.

5. There is in fact no evidence that respondent Provident ever rejected the Tose/Eagle loan application. R. App. at A3.

6. Petitioners allege that respondents herein and others conspired to fix prime interest rates in Philadelphia, Bucks, Delaware and Montgomery Counties.

participation of the respondents in syndicated loans with common floating interest rates.

There is no dispute as to the manner in which joint or syndicated loans function. Typically, a borrower will arrange with a bank (the "lead" or "agent" bank) to borrow either directly from that bank or from a syndicate of banks at an interest rate determined by reference to the prime rate of the lead or agent bank. The lead bank may sell shares in a participation in the loan to other banks, or, if the loan is made initially by a syndicate of banks, those banks would participate in negotiations among themselves and with the borrower concerning the interest rate. A single interest rate, often (but not always) calculated by reference to the lead or agent bank's prime interest rate, is used. Regardless of the number of banks participating, the loan is a single transaction with the borrower at a single, albeit variable, interest rate.

Tose and the Eagles do not question the legality of joint loans *per se* but challenge only the "joint interest rate" aspects of such loans. Petitioners, who did not have a participation loan from any of the respondent banks, alleged that the mere existence of numerous syndicated loans constituted concerted action that somehow had the effect of raising interest rates generally, and that they were injured thereby.

B. The Proceedings Below

Respondents moved for summary judgment, pursuant to Fed. R. Civ. P. 56, on all counts of petitioners' Complaint; petitioners cross-moved for summary judgment on Count IV of the Complaint. On May 16, 1980, the district court granted respondent Girard's motion for summary judgment on all counts and granted summary judgment in favor of all bank respondents on Count IV. These orders were followed by an opinion issued May 28,

1980 (P. App. at 46-68). Trial on the remaining counts began on June 2, 1980.

Petitioners' affirmative case consumed over three weeks of trial. At the close of petitioners' case, respondents PNB and Provident moved for directed verdicts, pursuant to Fed. R. Civ. P. 50, on Count I of petitioners' Complaint. These motions were granted on June 30, 1980. R. App. at A2:

On July 24, 1980, after the trial of respondent Sidney Forstater's counterclaims (but before the resolution of his post-trial motions) petitioners filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.[7] Oral argument of petitioners' appeal was held before a panel of the Third Circuit on March 19, 1981.

In an opinion filed April 30, 1981, the Court of Appeals affirmed the determinations of the district court. With regard to Count I of the Complaint, the Court of Appeals agreed that petitioners had not submitted sufficient evidence from which a jury could infer the existence of a conspiracy to deny petitioners access to the credit market. With regard to Count IV the Court of Appeals concluded that petitioners did not have standing to assert their claim challenging the legality of syndicated loans because they failed to produce evidence to support any causal link between those agreements and petitioners' alleged injury.

Rehearing of petitioners' appeal was denied on May 22, 1981. Petitioners have now come to this Court seeking a Writ of Certiorari.

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7. Respondents moved to dismiss this appeal as premature on October 8, 1980; this motion was denied by the Court of Appeals. P. App. at 6, n. 2.

REASONS FOR DENYING THE WRIT

The questions presented in this action, and the proceedings below, do not raise matters appropriate for the exercise of this Court's discretionary review by certiorari. Contrary to the broad but unsupported assertion in petitioners' statement of "Reasons for Granting the Writ," (Petition at 17-22), this case does not present any conflict between a decision of the Court of Appeals for the Third Circuit and a decision of any other Court of Appeals on a related matter, nor does it raise any important question of federal law which has not been settled by this Court, or which has been decided by the courts below in a manner inconsistent with prior decisions of this Court. *See* Supreme Court Rule 17. To the contrary, the Petition simply raises a challenge to the affirmance by the Court of Appeals of summary judgments and directed verdicts occasioned by the plain failure of petitioners, plaintiffs below, to sustain their burden of presenting facts which would permit a jury reasonably to resolve the issues presented in their favor, and upon which relief could be granted them accordingly.

A. A Verdict was Properly Directed on Petitioners' Banking Boycott Claim

Petitioners pose three questions which are at least arguably relevant to their claim that the respondents herein conspired to deny them credit. The first two ("questions presented" Nos. 1 and 2) ask whether (1) a conspiracy to deny credit is, standing alone, a violation of § 1 of the Sherman Act, and (2) whether an "admitted" conspiracy to deny credit is, standing alone, a violation of § 1 of the Sherman Act, absent a showing of impact on competition. Petition at *i*. Apart from the apparent redundancy of these questions, they are not issues presented

by the Court of Appeals' decision on this claim in favor of respondents herein. Respondents herein never questioned the proposition that a conspiracy to deny credit can constitute a violation of § 1 of the Sherman Act; the Court of Appeals decided this question in petitioners' favor:

> We see no . . . obstacles to [petitioners'] claim that the appellee banks and others conspired to deny them access to the credit market. The clear effect of such a conspiracy would be to stifle competition among the participants for a substantial credit transaction, with the further result of hindering the free flow of goods, services and investment capital as dictated by market forces of supply and demand. We conclude that [petitioners] have successfully alleged an unreasonable restraint of trade in violation of § 1. Therefore, we must review the record to determine whether [petitioners] were entitled to a jury determination of the question of a banking boycott conspiracy involving variously, Barness, and the First Pennsylvania, Provident, Chase, Girard, and Philadelphia National banks.

P. App. at 28. These "questions presented" provide no reason for this Court to entertain this petition against respondents herein.

In their statement of questions presented, petitioners also purport to present an issue concerning the Court of Appeals' analysis of the evidence relating to a banking boycott, but they present no argument relating to this question in their discussion of reasons for granting the writ of certiorari. Simply stated, both of the courts below held that petitioners failed to present specific evidence from which a jury could infer the participation of any of the banking respondents in a boycott of petitioners. Peti-

tioners plainly failed to carry their evidentiary burden, and the district court properly directed verdicts in favor of PNB and Provident, and properly granted summary judgment in favor of Girard. The issue of the sufficiency of evidence to establish participation of a defendant in an alleged conspiracy is hardly an appropriate issue for consideration by this Court on certiorari.[8]

B. Summary Judgment Was Properly Granted on Petitioners' Rate-Fixing Claim

In Count IV of their Complaint, petitioners alleged that the respondents herein conspired to fix interest rates in the four-county Philadelphia area,[9] in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Petitioners sought damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15. At the close of discovery, petitioners and all respondents moved for summary judgment on this Count; respondents' motions were granted. P. App. at 63-68. The Court of Appeals affirmed the grant of summary judgments in favor of respondents. P. App. at 35-37.

The portion of the district court's opinion dealing with Count IV of petitioners' complaint makes two points: (1) petitioners did not offer sufficient evidence from which

8. Petitioners' formulation of this issue ("question presented" No. 7) relies upon *Continental Ore Co. v. Union Carbide*, 370 U.S. 690 (1962). That case does not dispense with the requirement that a plaintiff carry the burden of proof, separately as to each defendant, that the defendant did something other than "exercise his own independent discretion as to parties with whom he will deal." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). In their lengthy statement of facts (Petition at 4-16) petitioners make no specific reference to any evidence regarding the alleged participation by Provident, PNB or Girard in the alleged banking boycott, nor do they present any suggestion why the Court should grant certiorari to address this question.

9. *See* Note 4, *supra*.

a jury could conclude that the respondents engaged in concerted activity for the purpose of "tampering" with interest rates, and (2) the concerted activity petitioners did point to—the syndicated loans—were not presumptively unreasonable restraints on trade (i.e., *per se* violations of § 1 of the Sherman Act) and, there being no *evidence* that the practice of making syndicated loans with a common interest rate is an unreasonable restraint of trade, respondents were entitled to summary judgment.[10] P. App. at 63-68. The Court of Appeals did not reach the question of the *per se* illegality of syndicated loans with common interest rates because it noted that the record was devoid of evidence that the violation petitioners alleged had any causal relationship to their alleged injury. This being the case, the Court of Appeals correctly concluded that petitioners had no standing to attack the practice of having common interest rates on syndicated loans. P. App. at 35-37.

In the Petition for Writ of Certiorari, petitioners pose two questions they believe are presented by the Court of Appeals' affirmance of the district court's grant of summary judgment to each respondent on Count IV of petitioners' Complaint. The first question presented (No. 5) is whether the existence of syndicated loans with common floating interest rates constitutes a *per se* violation of § 1 of the Sherman Act, and, presuming a *per se* violation, whether an adverse effect on plaintiff by virtue of the presumed violation should have been (1) a matter for the jury's speculation, or (2) presumed as a matter of law. The second question (No. 6) is whether, on the facts of this case, the petitioners had standing to bring an action

10. Petitioners have throughout this litigation relied completely on a *per se* theory of liability; they have never attempted to prove that joint loans with common interest rates unreasonably restrain competition.

(under § 4 of the Clayton Act) for the particular violation of § 1 of the Sherman Act alleged in Count IV of their Complaint. Petition at *i-ii*.

In the portion of the Petition for Writ of Certiorari entitled "Reasons for Granting the Writ," petitioners assert that the petition should be granted because of the "confusion, indeed near chaos, that exists iner-circuit [sic] and intra-circuit . . . on . . . the Sherman Act, 15 U.S.C. 1." Petition at 17-18. Petitioners go on to assert that there is particular "disarray" on the subject of antitrust standing. Petition at 18. Petitioners understandably do not cite any cases to support their assertion that there are conflicts, in and among the circuits, with regard to any of the rulings adverse to them. Each is based on a legal principle upon which there is complete accord, and which is fully consistent with the decisions of this Court.

Petitioners take the position that the numerous syndicated loans in which respondents participate, together with hundreds of banks across the country, constitute concerted action in and of themselves which unreasonably restrains trade.[11] The particular vice of syndicated loans,

11. As the district court noted below, petitioners' theory of liability on Count IV of their Complaint appeared to change from brief to brief. P. App. at 63. Petitioners seemed unable to decide between a contention that syndicated loans were somehow probative of an overall combination with the purpose or effect of fixing interest rates, and a contention that these loans in and of themselves constituted concerted action with that purpose or effect. In the end, petitioners appeared to settle on the latter theory of liability. *See* P. App. at 65, n. 15.

Even if petitioners had relied below upon the group of facts enumerated in the Petition at page 12 as furnishing evidence of an overall combination to fix interest rates, summary judgment was proper. Those facts could not support such an inference. *See, Weit v. Continental Illinois National Bank*, 641 F.2 457 (7th Cir. 1981) (no inference of conspiracy is permissible from the

petitioners allege, is that the participants in such loans often agree to follow the interest rate of the "lead" bank. This, petitioners allege, is a *per se* violation of § 1 of the Sherman Act. *See* P. App. at 65, n. 15. Petitioners assert that they have been injured by being required to pay an artifically high interest rate on money borrowed from respondent First Pennsylvania Bank.

The success or failure of petitioners' theory that respondents' joint loan agreements constituted a conspiracy to fix interest rates depended on their ability to demonstrate two facts: (1) that the concerted action in question unreasonably restrained trade, and (2) that petitioners were injured thereby. Petitioners attempted to avoid the first burden by labeling the existence of syndicated loans with common interest rates a *per se* violation of § 1 of the Sherman Act; they attempted to avoid the second by mere assertion. Both of these efforts failed.

The district court correctly realized that the application of a "price-fixing" or "*per se*" label does not make a restraint unreasonable; rather, knowledge, based on experience, that a particular type of restraint is inevitably unreasonable justifies the application of a *per se* label. "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . ." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979), (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972)). Petitioners offered no evidence that joint loans with common interest rates were "plainly anticompetitive," *see National Society of Professional Engineers v. United States*, 435 U.S. 679, 692

11. (Cont'd.)
identity of interest rates charged by competing banks and a showing that those banks had an opportunity to conspire). *See generally*, the opinion of the Court of Appeals, P. App. at 31-34.

(1978) nor did they offer any evidence that particular loans were unreasonable restraints on trade.[12] Having no evidence to offer that the concerted action they pointed to unreasonably restrained trade, petitioners were unable to withstand respondents' well-supported motions for summary judgment on Count IV of their Complaint.

The Court of Appeals did not find it necessary to reach the question of the reasonableness of respondents' syndicated loan agreements. As the Court of Appeals noted, the causal link between the injury alleged by petitioners (who did not have a syndicated loan) and the concerted action they pointed to existed neither in fact nor in theory. The appellate court concluded that the petitioners had no standing to assert a claim based on the concerted activity involved in syndicated loan agreements.

Petitioners suggest that they have been prejudiced because the issue of "standing" was "discovered" by the Court of Appeals and they had no opportunity to address it. They go on to suggest that the issue is not really "standing" but "causation," and that this question (which was certainly not an issue "discovered" by the Court of Appeals, and one which petitioners had ample opportunity to address) should have been submitted to the jury. Petitioners attempt to obscure the central issue with their discussion of "standing" and "causation;" this discussion of labels does not change the fact that petitioners failed to point to evidence necessary to their theory of liability.

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12. Although neither court below was required to actually examine the reasonableness of syndicated loans, it is clear that such arrangements do not unreasonably restrain trade. As was noted in respondents' arguments below, joint loan agreements are essentially *ad hoc* joint ventures that facilitate rather than restrain trade. *See United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953).

Petitioners not only failed to demonstrate that there was any relationship between the injury they alleged and the violation they alleged, they failed to identify a causal chain by which such a relationship might have been established, even if supported by evidence.[13] In sum, petitioners failed to suggest why their alleged injury was "the type of loss that the claimed violation . . . would be likely to cause." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)). Whether called a "standing" problem or a "causation" problem, this failure was fatal to petitioners' claim.

Despite extensive discovery, petitioners never came forward with even a theoretical chain of causation linking syndicated loans with the overall prime rate; they were content, as noted by the Court of Appeals, to rest on "[b]ald factual assertions." P. App. at 36. In the face of uncontradicted sworn testimony by each respondent that its prime rate was the product of unilateral decisions and was not affected by the existence of syndicated loans, petitioners' conclusory assertions could not substitute for "significantly probative" evidence sufficient to create a genuine issue as to the existence of a causal chain, and thereby withstand a motion for summary judgment. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288 (1968).[14]

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13. Failure to show that a particular injury *happened* because of a preceding event might be termed a failure to show "causation"; failure to suggest how a particular injury *could have happened* because of a preceding event might be fairly described as a failure to demonstrate "standing."

14. By way of supporting their claim that the existence of these syndicated loans constitutes a conspiracy to generally fix interest rates on all prime-rate loans, petitioners refer to two decisions of this Court, *United States v. Socony-Vacuum Oil Co.*,

In the final analysis, Count IV of petitioners' claim fell because they failed to present evidence of concerted action with either the purpose or effect of raising the interest rates which they paid. Summary judgment on this claim was not based on questionable precedents or untested theories; it was based on petitioners' utter failure to produce significant, probative evidence of facts which, if proven, would have supported their claim. In this light, petitioners' request for certiorari can hardly be deemed worthy of this Court's attention.

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14. (Cont'd.)
310 U.S. 150 (1940), and *United States v. Container Corp.*, 393 U.S. 333 (1969). Petitioners cite *Container Corp.* (which they describe as concerning an "arrangement . . . infinitely more attenuated" than joint loan agreements (Petition at 22), presumably to suggest that if the facts of that case indicated concerted action with the purpose or effect of "tampering" with prices, then the facts of this case, *i.e.*, the existence of syndicated loans, must be at least equally probative of such concerted action.

Petitioners' argument misses the point. Respondents have never disputed, and do not now dispute, that syndicated loans are, in a literal sense, concerted action. Respondents' arguments, which were identified and accepted below, are (1) that these "concerted" acts do not, taken singly or together, unreasonably restrain trade, and (2) that petitioners were in no way affected by the practice of "following the leader" on syndicated loans. In *Container*, the Court struck down an agreement it found *had the effect* of stabilizing prices throughout an entire market, an effect which invariably constitutes an unreasonable restraint of trade. 393 U.S. 333, 336-337 (1969). As indicated above, there is no evidence in this case that syndicated loans had any effect on the prime interest rate, and therefore on petitioners, nor that they are unreasonable restraints of trade with regard to those they do affect. *Container*, of course, did not present any question of standing of a private party to seek treble damages for a violation of the antitrust laws.

CONCLUSION

In light of all of the foregoing, respondents herein respectfully submit that the Petition for Writ of Certiorari should be denied.

Dated: August 28, 1981 Respectfully submitted,

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APPENDIX

Excerpts From Transcript of Proceedings Before the Honorable Clifford Scott Green, J.

June 30, 1980

Philadelphia, Pennsylvania

[19.3]

(The court began its proceedings at 11:45 a.m.)

• • •

The Court: As you know, there are presently pending before the Court motions filed on behalf of all defendants for directed verdicts pursuant to Rule 50(a) of the Rules of Civil Procedure. I have heretofore granted summary judgment in favor of Girard Bank and Chase Manhattan Bank as to the banking boycott conspiracy charge and in favor of course of all defendants on the interest fixing charges, so these matters are not now before me.

In deciding the motions, I view the evidence and all reasonable inferences falling therefrom in the light most favorable to the plaintiffs.

Count I of the complaint charges violations of the Sherman Act in that it's alleged that the parties defendant collaborated in a plan to force a distress

[19.4]

sale of Mr. Tose's interest [in] the Eagles to Mr. Barness.

After careful review of all the evidence, I find that the evidence and the reasonable inferences therefrom

viewed in the light most favorable to the plaintiffs do not support the conspiracy charges and the other charges set forth in the complaint.

Accordingly, I grant the motion of all defendants for a directed verdict.

I base this decision on the following view of the evidence.

First, the evidence is insufficient to establish the conspiracy alleged and sought to be proved. I've considered all of the evidence submitted in reaching this conclusion.

While there is direct evidence by way of denial by all of the alleged co-conspirators, that they participated in any conspiracy, and while there is—there are business explanations offered by all of the defendants in this matter, there is no direct evidence, of course, of a conspiracy. There is direct evidence which [if] believed by a jury would support a verdict in favor of defendants; however, a conspiracy may be established entirely by circumstantial evidence and, of course, the law makes no distinction between

[19.5]

direct and circumstantial evidence.

Thus, I have [carefully] reviewed the evidence to determine if a jury could reasonably infer from the evidence the conspiracy alleged. I feel the evidence totally is inadequate to permit such an inference. The evidence does establish that at various times Mr. Tose and the Eagles were involved in several separate disputes with the partners, Firestone and Barness and with its bank, First Pennsylvania Bank. However, there is no evidence to tie these separate disputes into the complaint of conspiracy.

• • •

[19.16]

• • •

Turning next to Provident there is no evidence that Provident joined the conspiracy. First, there is no evidence that Provident, in fact, turned down the requested loan. The only evidence is that Mr. Tose and his representatives walked out and did not bother to advise Provident further about the loan when they were told that some measure of cooperation or joinder would be required of Mr. Barness.

There is no evidence that the condition relating to Mr. Barness' cooperation was insurmountable or that it was advanced by Provident merely as a roadblock to entering into the agreement.

All of the evidence is to the contrary. The meeting with Mr. Hillas and Mr. Barness is not probative of a conspiracy. It is clear that both Mr. Barness and Mr. Hillas have denied any agreement was reached or discussed at that time.

Accordingly, once again, that meeting

[19.17]

could not possibly form the basis for the finding of a conspiracy. Viewed in the context of a bank, Provident, about to make a multi-million dollar loan to the Eagles of which Mr. Barness owned approximately a 30 percent interest, it cannot be said that a jury in that context could infer from a meeting with the bank that there was a conspiracy . . . .

Finally, it is clear that the evidence reveals no motive for Provident to help either First Pennsylvania Bank enhance its banking position or to help Mr. Barness acquire control of the Eagles. Nor is there any motive, any evidence which would support a finding of a motive

of Provident Bank to hurt Mr. Tose. Mr. Tose was a friend of a valued customer and all that appears in the evidence is that he, that they were, in fact, sincere in entering into a consideration of a loan application.

On this record a jury could not find the involvement of Provident in a conspiracy. And accordingly I grant the motion to Provident as to this count of the indictment.

Turning next to Philadelphia National Bank, the only evidence is that Mr. Pettit communicated or replied to the Banque Bruxelles Lambert,

[19.18]

which had invited PNB's participation in the loan to the Philadelphia Eagles. His response was, first, that the Philadelphia National Bank was not interested in participating in a loan to Mr. Tose and the Eagles.

And, second, he responded with what may be what a jury could find [in]appropriate language to a credit inquiry. It is clear that the evidence reveals that the bank subsequently declined other invitations to enter into financing ventures. And . . . made some statements to Citibank.

The bank's chief executive officer has been called as an adverse witness and has testified that the reasons for the bank not entertaining the application for the Philadelphia Eagles' loan or the loan to Mr. Tose was that the bank, as a matter of policy, avoided high disability loans; and that a loan to the Eagles and Mr. Tose would fall within that category

There is no evidence to the contrary. There is no evidence that the bank ever agreed with anyone in regard to this particular matter.

There is evidence of passing exchanges by friends, Mr. Dorrance and Mr. Pemberton. But my

[19.19]

view of the evidence and of the law is that such passing exchanges are not without more probative value . . .

There is also evidence that there were meetings of the clearinghouse committee in that the clearinghouses had served no particularly useful function at this time.

However, the evidence concerning those meetings is clear. The minutes do not reveal that there was any discussion at all about the Tose and Eagles matter and First Pennsylvania Company and the parties who were present who had been asked about this [have] denied that there was any such discussion.

There is evidence, of course, that Mr. Dorrance had some general knowledge of the ongoing conflict between First Pennsylvania Company and Mr. Tose.

However, that knowledge is insignificant in this particular case because it is clear that Mr. Tose called a press conference where[in] he made it public knowledge the difficulties that he was having the with the bank.

[19.20]

Therefore a finding that an official had some knowledge after Mr. Tose's disclosure is not probative of a conspiracy. I conclude that a jury could not infer Philadelphia National Bank participated in this particular conspiracy, in any conspiracy.

* * *

There is no evidence that any of the defendants acted other than in their own financial interest or that any of the present defendants had any motivation to aid Mr. Barness in the conspiracy to gain control of the Eagles from Mr. Barness.

Basically the plaintiffs rely upon the testimony of the adverse witnesses to make out their case. And it is clear they have failed to obtain from any of the adverse witnesses any [ad]mission favorable to plaintiff.

The Court of Appeals has said in Venzie that while a jury is free to disregard a defendant's

[19.21]

testimony, that no agreement of any kind was formulated during the course of the contact, mere disbelief could not rise to the level of positive proof of agreement to sustain a plaintiff's burden of proving conspiracy.

Accordingly, the Court finds that as to all the defendants there is no evidence of a conspiracy and that the motion for directed verdict must be granted as to count one.

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